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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

LIONEL DEMETRIACE BONNER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent,

Petition For Writ of Certiorari To the Texas Court of Appeals for the First Court of Appeals District

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PETITION FOR WRIT OF CERTIORARI

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30pp

QUESTION PRESENTED FOR REVIEW

Defendant pleaded guilty and cooperated with the State by testifying against his co-defendants. His trial attorney mistakenly believed he had come to an informal agreement with the State as to a ten year cap on the possible sentence. This agreement was informal so that the State could avoid having to notify counsel for the co-defendants that the Defendant was receiving any benefit for his testimony. Defendant received a thirty [30] year sentence. Did the trial attorney's actions constitute ineffective assistance under the Sixth Amendment such that the Defendant's guilty plea was rendered involuntary?

LIST OF ALL PARTIES

R. Scott Shearer - Attorney for Appellant.

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Houston, TX 77002

Lionel Bonner - Appellant.

Kate Dolan - Counsel for the State of Texas.

201 Fannin
Houston, TX 77002

Calvin Hartman - Appellate Counsel for the State of Texas

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Honorable Brian Rains - Presiding Judge of the Trial Court.

232nd District Court
1201 Franklin
Houston, TX 77002

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CITATION TO OPINIONS BELOW

The opinion of the First Court of Appeals is not reported. It is included in the appendix to this writ.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 23, 1999. The Defendant's Petition for Discretionary Review was denied by the Texas Court of Criminal Appeals on May 24, 2000. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Sixth Amendment to the United States Constitution provides, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Defendant was charged with aggravated kidnapping. The Defendant entered an unconditional plea of guilty and agreed to testify against his co-defendants. The Defendant's trial counsel believed ha had reached an informal agreement with the State for a ten year cap on the potential sentence. Trial counsel believed the agreement was an informal one, so that the Defendant could testify for the State without appearing to receive anything for his testimony. In this manner, the State could avoid the requirements of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) and would not have to notify counsel for the co-defendant's that the Defendant was going to receive a benefit for his testimony. The Defendant would thus appear more credible to the juries he testified before. At the time of sentencing, the State notified the Defendant's attorney that there was no "cap" and the Defendant was sentenced to thirty [30] years, which was more than the sentences received by the co-defendants he testified against, even though all agreed his culpability was much less. The Defendant filed a motion for new trial, raising the ineffective assistance of counsel claim. When the trial court overruled his motion, Defendant appealed to the court of appeals, where he argued that the ineffective assistance of his trial counsel rendered his plea involuntary. *See Bonner v. State*, (Tex. App. - Houston [1st Dist.] 1999, pet. ref'd)(unpublished). After the court of appeals affirmed his conviction, the Defendant filed a Petition for Discretionary Review with the Court of Criminal Appeals, where he again raised the Sixth Amendment issue. Defendant's petition was denied on May 24, 2000. This Petition for Writ of Certiorari is timely filed within 90 days of the entry of the order denying review. *See* SUP. CT. R. 13.1.

SUMMARY OF THE ARGUMENT

A trial attorney's mistaken belief that he has reached an informal agreement with the State renders ineffective assistance under the Sixth Amendment such that his client's guilty plea is rendered involuntary.

ARGUMENT

The Appellant was charged with aggravated kidnapping. The Appellant hired Connie B. Williams as his trial attorney. (RR V at 9). Early in the case, Mr. Williams entered into negotiations with the State with regards to a possible guilty plea and cooperation in exchange for a favorable sentence. (RR V at 10, 18). The Appellant pleaded guilty and testified against three other co-defendant's, one of whom was his own brother-in-law. (RR IV at 9-10). The Appellant's testimony was essential to the State's cases against the other co-defendants. (RR IV at 9). Appellant put himself at substantial risk by agreeing to become a witness for the State. (RR V at 21). The district attorney who handled the cases believed the Appellant to be less culpable than the other defendants. (RR IV at10). During the negotiations, Mr. Williams knew that any agreement with the State would have to be an informal one. (RR V at 11). Otherwise, the deal would have to be disclosed to the attorneys for the co-defendants Appellant was to testify against. (RR IV at 16)(RR V at 11).[1] Mr. Williams believed he had successfully negotiated an informal plea agreement

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[1] This is an obvious reference to *Brady* and *Giglio*.

with the State that was not written in the plea papers. (RR V at 11). Mr. Williams also believed the State would make a recommendation to the low end of the range when no such agreement was included in the plea agreement. (RR V at 13). Mr. Williams thought the state would make a recommendation at the time of sentencing because of Appellant's extensive cooperation. (RR V at 16). Mr. Williams thought the Appellant would receive an approximate ten year sentence. (RR V at 15). He told the Appellant's family that he was negotiating a ten year "cap" on the possible sentence and that probation was a possibility. (RR V at 15). Only at the time of sentencing, after the plea, did Mr. Williams discover that the State was not going to make a recommendation as to the sentence. (RR V at 15-16).

Assistant district attorney Brian McLellan testified that there was no informal plea bargain agreement and that Mr. Williams was mistaken about a cap on the potential sentence. (RR IV at 11). As Mr. McLellan remembers it, Mr. Williams walked into court on the day of sentencing and said, "We have a cap, don't we, in the case?" (RR V at 7). During a debriefing with Mr. McLellan, the Appellant said he thought he was receiving ten years probation in exchange for his plea, which caused A.D.A. McLellan to "go ballistic". (RR IV at 15).

The Appellant testified at the new trial hearing. (RR VI at 20). Before the plea, it was the Appellant's understanding that both the State and his attorney were going to recommend ten years deferred adjudication to the judge. (RR VI at 23). The Appellant would not have pleaded guilty if he had known there was no plea agreement. (RR VI at 23, 27). Before the plea, the Appellant rehearsed what answers to give the judge during the plea colloquy. (RR VI at 26). Only after the plea did the Appellant learn that the judge had the full range of punishment at his disposal. (RR VI at 31).

The Appellant's father, Lonnie Nunn, also testified at the new trial hearing. (RR VI at 6). Mr. Nunn was a participant in the discussions with Connie Williams and took an active involvement in the case. (RR VI at 8). Mr. Nunn

testified that Connie Williams told him specifically that he had obtained a ten year cap on his son's sentence. (RR VI at 7). Mr. Williams assured Mr. Nunn that there was nothing to worry about. (RR VI at 8). After the Appellant testified against the first co-defendant, Mr. Nunn called Connie Williams and asked if there was anything in black and white. (RR VI at 8). Mr. Williams then said he could go back to the D.A. and to the judge and get a one-hundred percent guarantee. (RR VI at 9). Mr. Nunn would not have allowed his son to sign the plea agreement if he had known there was no plea agreement with the State. (RR VI at 9).

The Appellant received nothing in exchange for his cooperation. (RR 5 at 17). In fact, he received more time on his sentence than the people he cooperated against, even though the district attorney thought the Appellant to be less culpable. (RR IV at 13).

The standard for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984). Appellant must show both (1) that counsel's representation fell below an objective standard of reasonableness, and (2) the probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* The Appellant must identity counsel's acts or omissions alleged not to have been the result of reasonable professional judgment. The Court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2065. A reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.

In the context of a guilty plea, a defendant must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). The prejudice requirement "focuses on whether counsel's constitutionally

ineffective performance affected the outcome of the plea process." *Id.*

This Court has held that, "Solemn declarations in open court carry a strong presumption of verity," forming a "formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 1628-29, 52 L.Ed.2d 136 (1977).

Nevertheless, a defendant may seek relief on the basis of alleged promises, though inconsistent with representations he made in open court when entering his guilty plea, by proving (1) the exact terms of the alleged promise, (2) exactly when, where, and by whom the promise was made, and (3) the precise identity of an eyewitness to the promise. *See Harmason v. Smith*, 888 F.2d 1527, 1529 (5th Cir.1989).

A. Trial counsel erred by informing the Defendant there was an agreement when no agreement existed.

In the present case, Connie Williams erroneously advised the Appellant that a deal was reached between the State and the Appellant when no such deal existed. This, in turn, caused the Appellant to plead guilty when he would not have done so otherwise.

During the hearing on Appellant's Motion for New Trial, undersigned counsel and the court itself questioned the Appellant's trial counsel concerning what Appellant had been told regarding a plea agreement. Mr. Williams' testimony from the Motion for New Trial hearing indicate that he was horribly mistaken as to whether or not a plea agreement was in effect. Appellant's trial counsel believed that there was an off the record plea bargain when none existed. (RR IV at 11). Appellant's trial counsel also believed the State would make a recommendation to the low end of the range when no such agreement was included in the plea agreement. (RR V at 13). Mr. Williams thought the State would make a

recommendation at the time of sentencing because of Appellant's extensive cooperation. (RR V at 16). Only at the time of sentencing, after the plea, did Mr. Williams discover that the State was not going to make a recommendation as to the sentence. (RR V at 15-16). This was corroborated by A.D.A. McLellan, who testified that Mr. Williams walked into court on the day of sentencing and said, "We have a cap, don't we, in the case?" (RR V at 7).

Had the Appellant known that no deal was in force and the State would not make a recommendation, he would have insisted upon a jury trial. (RR VI at 23, 27). Appellant's trial counsel told the Appellant's family to expect a sentence of probation or, at the most, a ten year sentence. (RR V at 15). Had the Appellant and his father known that the deal was only an illusion in the mind of trial counsel, the Appellant would not have entered into such a high risk plea.

B. <u>But for these errors, the outcome of the trial would have been different.</u>

In the context of a guilty plea, prejudice is present if there is reasonable probability that absent counsel's errors the defendant would not have entered a guilty plea and would have insisted on a trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

Had Appellant been given correct information concerning both the consequences of entering a plea without a recommendation and the lack of a plea bargain agreement, the Appellant would not have entered a guilty plea. This is supported both by the affidavits of the Appellant and his father attached to the Appellant's Motion for New Trial and their respective testimonies at the Motion for New Trial hearing. Trial counsel's failure to provide accurate information deprived the Appellant of making an informed, conscious choice to plead guilty.

Mr. Williams' advice, or lack thereof, concerning the Appellant's plea constitute gross deviations from the zone of reasonable professional judgment. As a result, the Appellant entered into a high risk "open" plea bargain without a full and complete understanding of the consequences and received a thirty year aggravated sentence – more even than those codefendants whom he testified against. (RR IV at 13). Mr. Williams' deficiencies are sufficient to undermine confidence in the Appellant's plea. This Court should find that the Defendant did not receive effective assistance of counsel.

CONCLUSION

The Defendant did not receive effective assistance of counsel and this ineffectiveness rendered his guilty plea involuntary.

Respectfully submitted,

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No. _____

In The

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October Term, 1999

LIONEL DEMETRIACE BONNER,

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THE STATE OF TEXAS,

Respondent,

Petition For Writ of Certiorari To the Texas Court of Appeals for the First Court of Appeals District

APPENDIX

OPINION

Opinion issued December 23,1999

In The
Court of Appeals
For The
First District of Texas

NO. O1-97-01042-CR

LIONEL DEMETRIACE BONNER, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No.713190

OPINION

Appellant, Lionel Demetriace Bonner, and Eric Cathey, Sonny Baker, and James DeLeon were arrested in connection with the kidnapping and capital murder of a 20-year-old female, Christina Castillo. Appellant pled guilty without a punishment recommendation to aggravated kidnapping and agreed to testify against Cathey, Baker, and DeLeon. Although the State sought life sentences, separate juries assessed DeLeon's punishment at 25 years and Baker's at 27 years. Cathey received the death penalty.

Following a presentence investigation, the trial judge assessed appellant's punishment at 30 years in prison. The full range of punishment was 5 to 99 years or life and up to a $10,000 fine.

In three points of error, appellant contends that his guilty plea was involuntary because it was the result of ineffective assistance of counsel. This is so because, when appellant pled guilty, he believed that his trial counsel had an

informal agreement with the State whereby appellant would receive a sentence at the low end of the range of punishment, possibly 10 years or even probation, in exchange for his plea and testimony against the co-defendants.

The record shows that the State never agreed to a reduced sentence or probation and that it was always the State's intent for the trial court to assess punishment after a presentence investigation report and for the State to remain silent as to punishment.

Discussion

A plea of guilty involves a waiver of constitutional rights that must not only be voluntary, but must be done knowingly and intelligently with sufficient awareness [2] of all relevant circumstances and likely consequences. *Brady* v. *United States,* U.S. 742, 748, 90 S. Ct. 1463, 1468 (1970); *Messer* v. *State,* 757 S.W.2d 820, 824 (Tex. App. – Houston [1st Dist.] 1988, pet. ref'd). An open plea of guilty waives all

nonjurisdictional defects that occur prior to entry of the plea. *Jack* v. *State,* 87 S.W.2d 741, 743-44 (Tex. Crim. App. 1972); *Helms* v. *State,* 484 S.W.2d 925, 927 (Tex. Crim. App. 1972). The waiver rule is, however, predicated on a knowing and voluntary plea. Thus, the rule does not bar appeals in open plea cases when a defendant claims the plea was involuntary. *Flowers* v. *State,* 935 S.W.2d 131, 133 (Tex. Crim. App. 1996).

Appellant contends his guilty plea was involuntary because his trial attorney led him to believe that there was a "deal" with the State by which appellant would receive either a probated sentence or a sentence at the low end of the punishment range, such as 10 years. Instead, the trial judge imposed a 30-year prison term, even though appellant had been considered the least culpable of those involved in the kidnapping and murder and even though juries assessed punishment at 25 and 27 years for two of the defendants against whom appellant testified. Basically, appellant's complaint is that his longer sentence is just not fair and he

would not have pled guilty if he had known there was no deal for a lighter sentence, especially since those against whom he testified received shorter sentences than he did.

On appeal, we decide (1) whether the trial judge, sitting as a trier of fact at the [3] hearing on appellant's motion for new trial, was bound to accept appellant's and his father's testimony as conclusive proof of the involuntary nature of appellant's plea and (2) whether the legal representation afforded appellant by his trial counsel was so ineffective as to require a reversal of his conviction.

Before accepting a plea of guilty, a trial court must admonish the defendant in accordance with article 26.13, either orally or in writing. *Ex parte Gibauitch,* 688 S.W.2d 868, 870 (Tex. Crim. App. 1985); TEX. CODE CRIM P. ANN. art. 26.13 (Vernon 1989). The purpose of article 26.13 is to assure that a defendant who pleads guilty understands the charges against him and the consequences of his plea. *Basham* v. *State,* 608 S.W.2d 677, 678 (Tex. Crim. App. 1980). A record that shows the trial court properly

admonished the defendant is a *prima facie* showing that the defendant entered into a knowing and voluntary plea. *Ex parte Gibauitch,* 688 S.W.2d at 871. The burden then shifts to the defendant to show that he entered his plea without understanding the consequences of his action and, thus, was harmed. *Id.*

A defendant's attestation of voluntariness at the original plea hearing imposes a heavy burden on the defendant at a later hearing to show a lack of voluntariness. *Dusenberry* v. *State,* 915 S.W.2d 947, 949 (Tex. App.-Houston [lst Dist.] 1996, pet. ref'd). On appeal, in determining the voluntariness of the plea, we consider the entire record. *Williams* v. *State,* 522 S.W.2d 483,485 (Tex. Crim. App. 1975). There is a presumption of regularity of the judgment and the proceedings absent a showing to [4] the contrary, and the burden is on the defendant to overcome this presumption. *Ex parte Wilson,* 716 S.W.2d 953, 956 (Tex. Crim. App. 1986). A plea is not involuntary solely because the accused pleads guilty out of a desire to limit the possible

penalty. *Flakes* v. *State,* 802 S.W.2d 844, 853 (Tex. App.-Houston [14th Dist.] 1990, pet. ref'd).

The record before this Court contains appellant's guilty plea that he signed at the original plea hearing, indicating that he understood the consequences of his plea after consulting with his trial attorney and that he entered his plea knowingly and voluntarily. The plea papers also show that the appellant's trial counsel and the trial court both verified that the appellant entered his plea voluntarily and knowingly after having fully discussed the plea and its consequences with his attorney.

In addition to the plea papers, the record includes the transcript from the plea hearing. It shows that appellant answered "yes" when the judge asked if he was pleading guilty because he was guilty and for no other reason, not because of any promises, fear, or persuasion on the part of his attorney or the district attorney. Twice during the hearing, the trial judge stated the full range of punishment for the

offense charged as not less than 5 years nor more than 99 years or life, plus a fine not to exceed $10,000.

Moreover, the trial judge informed appellant that, after a presentence investigation and a hearing, he, the trial judge, would assess appellant's punishment. [5] Appellant indicated that he understood that the trial court could consider deferred adjudication, probation, or the punishment range of 5 years to life in prison. Twice, appellant answered in the affirmative that he knew that he faced up to life in prison as a result of the guilty plea. Finally, appellant denied that anybody had promised him anything and acknowledged that no one had made any kind of a deal with him, that there was no agreement that he was going to receive a certain punishment, and further acknowledged that he was putting his punishment in the hands of the court.

Appellant's mother, present at the guilty plea hearing, responded to the trial judge's questions that she understood that her son's guilty plea meant that he faced a wide range of punishment.

At the hearing on appellant's motion for new trial, the trial court heard the direct and cross examination of appellant, his father, and his counsel, and it also heard the testimony of the prosecutor who had handled the case at trial. Appellant offered testimony tending to show that, based on the advice of trial counsel, he expected the court to grant probation or impose a much lighter sentence than it did. Appellant does not claim that his expectations (or those of his counsel) were based upon any improper assurances of the court or the prosecutor. Indeed, appellant and his counsel both acknowledged that there was never a deal with the State. It is because there was no deal that appellant contends his counsel was ineffective and his plea was involuntary in the sense that his expectations of what would occur were different [6] from what did, in fact, occur.

Based on the testimony at the hearing on the new trial motion, as well as the judge's own recollection of the events that took place during the plea hearing, three trials and the punishment hearing, the trial judge could reasonably have

decided that appellant's guilty plea was made knowingly and intelligently. In particular, the trial judge recalled asking appellant during each of the trials against his co-defendants whether there was any deal for a certain punishment or whether appellant knew what punishment he was going to receive. In each instance, appellant denied that there was any kind of deal or that he knew what his punishment might be. At no time did appellant assert any of the expectations that he asserted in his motion for new trial and to this Court for a probated or light punishment.

The granting or denying of a motion for new trial is a matter within the trial court's discretion. *State* v. *Gonzalez,* 855 S.W.2d 692, 696 (Tex. Crim. App. 1993). In considering a motion for new trial, the trial court possesses broad discretion in considering the credibility of the witnesses and in weighing the evidence to determine whether a different result would occur upon retrial. *Messer,* 757 S.W.2d at 827. The court may consider the interest and bias of any witness and is not required to accept as true the testimony of the

accused or any defense witness even if it was uncontradicted, which, here, it was not. *Id.* at 828.

The trial court, sitting as the trier of fact, was the sole judge of the witnesses' [7] credibility and the inferences to be drawn from their testimony. In that fact-finding determination, this Court may not substitute its judgment for that of the trial court, but rather, decides whether the trial court's decision was arbitrary or unreasonable. *Gonzalez,* 855 S.W.2d at 695 n.4. It is well established that the granting or denying of a motion for new trial lies within the sound discretion of the trial court.

We find that appellant has failed to sustain his burden to show that he entered his guilty plea without understanding the consequences of his action. The record shows that, in exchange for his plea of guilty and his testimony, he was charged with aggravated kidnapping, instead of capital murder. In addition, the State indicated that it would remain silent as to a punishment recommendation in light of the full

range of punishment, 5 to 99 years or life, plus a fine not to exceed $10,000.

Appellant's comments during the plea hearing show that he realized that the full range of punishment was available to the trial judge. Any statements made to appellant by his defense counsel about a "deal" with the State for punishment were simply counsel's erroneous expectation, speculation, and hope for the outcome of trial strategy. In view of the clear admonitions given by the trial court before the plea, appellant cannot credibly contend that his plea was involuntary and that he was denied effective assistance of counsel. *See Messer*, 757 S.W.2d at 827. The trial court did not abuse its discretion in overruling appellant's motion for a new trial. [8] We overrule points of error one through three.

The judgment of the trial court is affirmed.

Jackson B. Smith, Jr.[1]
Justice

Panel consists of Justices Cohen, raft, and Smith.
Do not publish. TEX. R. App. P. 47.

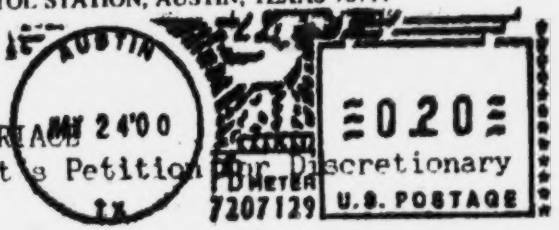
The Honorable Jackson B. Smith, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment. [9]

DENIAL OF DISCRETIONARY REVIEW

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

May 24, 2000
COA#: 01-98-01042-CR
RE: Case No. 0563-00
STYLE: BONNER, LIONEL DEMETRIAUS

On this day, the Appellant's Petition For Discretionary Review has been REFUSED.



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